(1)

No. 91-1829

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD D. JONES & CO., L.P.,
Petitioner,

v.

STEVEN W. and LINDA K. CARTER,
WILBUR E. and CAROL FRUSHOUR,
LARRY E. and NORMA B. LEWELLEN,
FLOYD C. and NORMA J. SICKLER,
and EUGENE W. and DONNA L. SMITH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

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QUESTIONS PRESENTED

1. Does the Federal Arbitration Act preempt a state statute which prohibits enforcement of an agreement to arbitrate unless it contains certain prescribed language?

2. Should this Court review the opinion of an Indiana appellate court holding that a Missouri statute which invalidates certain agreements to arbitrate is not preempted by the Federal Arbitration Act when the Missouri Supreme Court and the Eighth Circuit have expressly ruled to the contrary?

3. Did the Indiana court disregard the precedents of this Court and contravene the letter and spirit of the Federal Arbitration Act by ruling as a matter of state law that the parties' agreement to arbitrate should be construed against the draftsman rather than in favor of arbitrability?

STATEMENT PURSUANT TO RULE 14.1(b)

The following persons were parties to this case in the Indiana state trial court, but were not involved in the appeal to the Indiana Court of Appeals and are not parties in this Court:

Thurman D. &
Garnett R. Albright
Mrs. Gladys Anderson
Raybon Benson
Edith Bessignano
Larry & Therese Bowers
Loren D. & Alene Brown
Ray & Bonnie Brumbaugh
Mrs. Janet P. Carter
Bradley Haines
Mrs. Elizabeth R. Hillis
Samuel & Leticia Huff
Willis R. Kesling
Jay M. King
Thomas E. & Nellie Knight
Paul E. & Doris A. Mays
James H. &
Carlis J. McCauley
Mrs. Louise M. McDowell
Curtis B. & Mary M. Melton
Robert E. & Betty E. Murphy
Samuel L. & Barbara A. Nelson
Lloyd E. & Lorraine K. Pinney
Mrs. Lucy C. Powlen
Robert E. & Frances E. Ross
Mrs. Imogene R. Sharp
Henry S. & Eleanor D. Stephan
Gerald D. & Edith L. Stoughton
Merlin & Patricia Studebaker
Robert G. Swigert
Mrs. Janet K. Szewcyzk
Nicholas J. Vojtasek
Marvin E. &
Clara A. Whisler
Chester B. Wilson
Hubert E. &
Maurine B. Wilson
Ralph E. & Betty Wilson
Cletus Wittenbrink
Robert E. &
Dorothy E. Woodling
and
David M. Housworth

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 14.1(b)	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	2
Statutes and Constitutional Provision Involved	2
Statement of the Case	4
Reasons Why the Writ Should Be Granted	7
Conclusion	14

Appendix

A	—	Order of Fulton County, Indiana, Circuit Court, dated February 15, 1990	A-1
B	—	Opinion of Court of Appeals of Indiana, Third District, dated May 30, 1991	A-3
C	—	Order of Indiana Supreme Court denying Petition for Transfer, dated February 27, 1992	A-12
D	—	Memorandum in Support of Defendant's Motion to Compel Arbitration and to Stay Claims Asserted by Plaintiffs, filed October 29, 1989	A-14

TABLE OF AUTHORITIES

Page

Cases

AT&T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986) 13

Ackerberg v. Johnson, 892 F.2d 1328 (8th Cir. 1989) 9

Albright v. Edward D. Jones & Co., 571 N.E.2d 1329 (Ind. App. 1991) ..... 2,5,6,7,11.

Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982) 12

Bunge Corp. v. Perryville Feed & Produce, Inc., 685 S.W.2d 837 (Mo. banc 1985) ..... 6,10 .

Clark v. Kidder, Peabody & Co., 636 F. Supp. 195 (S.D.N.Y. 1986) 12

Commonwealth Edison Co. v. Gulf Oil Corp., 541 F.2d 1263 (7th Cir. 1976) 9

David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245 (2d Cir.), cert. dismissed, 112 S. Ct. 17 (1991) 10

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213 (1985) 13

Gilmore v. Shearson/American Express, Inc., 668 F. Supp. 314 (S.D.N.Y. 1987) 12

Frates v. Edward D. Jones & Co., 760 P.2d 748 (Mont. 1988) 11

Local 2, IBEW v. Anderson Underground Construction, Inc., 907 F.2d 74 (8th Cir. 1990) 5,10

Mamlin v. Susan Thomas, Inc., 490 S.W.2d 634 (Tex. Civ. App. 1973) 9

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 8,13

Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1 (1983) 8

Perry v. Thomas, 482 U.S. 483 (1987) 8

Pinkis v. Network Cinema Corp., 512 P.2d 751 (Wash. App. 1973) 9

Rand Bond of North America, Inc. v. Saul Stone & Co., 726 F. Supp. 684 (N.D. Ill. 1989) 12

Raytheon Co. v. Automated Business Systems, Inc., 882 F.2d 6 (1st Cir. 1989) 9

Securities Industry Ass'n v. Connolly, 883 F.2d 1114 (1st Cir. 1989), cert. denied, 495 U.S. 956 (1990) 10

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 13

Southland Corp. v. Keating, 465 U.S. 1 (1984) 8

Todd Shipyards Corp. v. Cunard Line, Ltd., 943 F.2d 1056 (9th Cir. 1991) 9

Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University, 489 U.S. 468 (1989) 5,7,13

Webb v. R. Rowland & Co., 800 F.2d 803 (8th Cir. 1986) 9,10

Yates v. Doctor's Associates, Inc., 549 N.E.2d 1010 (Ill. App. 1990) 9

Statutes

28 U.S.C. § 1257(a) 2

Federal Arbitration Act, 9 U.S.C. § 1, et seq. ..... *passim*

Missouri Uniform Arbitration Act, § 435.460 (Mo. Rev. Stat. 1986) 3

Other Authorities

U.S. Constitution, Art. VI 2

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

EDWARD D. JONES & CO., L.P.,
Petitioner,

v.

STEVEN W. and LINDA K. CARTER,
WILBUR E. and CAROL FRUSHOUR,
LARRY E. and NORMA B. LEWELLEN,
FLOYD C. and NORMA J. SICKLER,
and EUGENE W. and DONNA L. SMITH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

Edward D. Jones & Co., L.P., defendant in the action below, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of Indiana, Third District, filed on May 30, 1991, as supplemented by the Indiana Supreme Court's denial of a Petition to Transfer on February 27, 1992.

OPINIONS BELOW

The February 15, 1990, Order of the Fulton County, Indiana, Circuit Court, Judge Douglas Morton, granting defendant's motion to compel arbitration with respect to the present respondents is reproduced in Appendix A. The opinion of the Court of

Appeals of Indiana, Third District, filed May 30, 1991, reversing that Order and remanding the action for trial is reproduced in Appendix B and reported as *Thurman D. Albright, et al. v. Edward D. Jones & Co.*, 571 N.E.2d 1329.[1] The February 27, 1992, Order of the Indiana Supreme Court denying defendant's timely Petition for Transfer is reproduced in Appendix C.

JURISDICTION

The judgment of the Indiana Court of Appeals was entered on May 30, 1991, and a timely petition for transfer was denied by the Indiana Supreme Court on February 27, 1992 (Appendix C). This petition was filed within 90 days of February 27, 1992. Jurisdiction of this Court is founded upon 28 U.S.C. § 1257(a).

STATUTES AND CONSTITUTIONAL PROVISION INVOLVED

U.S. CONST. art. VI, cl.2:

> "This constitution and the laws of the United States, which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding."

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[1] Mr. Albright, his wife, and 54 other individuals were joined with respondents as plaintiffs in the Fulton County action from which this dispute arose, but only the respondents named in the caption appealed to the Indiana Court of Appeals from the trial court's order compelling arbitration.

9 U.S.C. (FEDERAL ARBITRATION ACT) § 2:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

MO. REV. STAT. § 435.460 (1986):

> "Each contract subject to the provisions of [the Missouri Uniform Arbitration Act] shall include adjacent to, or above, the space provided for signatures a statement, in ten point capital letters, which read substantially as follows: 'THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.' "

STATEMENT OF THE CASE

Plaintiffs-Respondents brought suit in Indiana state court against Petitioner Edward D. Jones & Company, L.P. ("petitioner" or "Jones"), arising out of their purchases through Jones of interests in certain gas and oil limited partnerships. After the purchase transactions, but before this action was commenced, respondents executed "Full Service Account" agreements ("Agreements") with petitioner, each of which contained a provision calling for arbitration of disputes between the parties. The Agreements generally provide that, with the exception of claims arising under the federal securities laws, "[a]ny other controversy arising out of [respondent's] accounts shall be settled by arbitration." (Record ("R.") 39, 41, 43, 45, 47.)[2]

Based on these arbitration provisions, the Federal Arbitration Act ("FAA") and the federal case law, petitioner moved the trial court to compel arbitration of respondents' claims.[3] The trial

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[2] The full text of a typical arbitration provision reads as follows:

> **"In the event [of] any claim or controversy between you and the undersigned arising under federal securities laws, you have the right to submit such matter before a judicial forum.** Any other controversy arising out of or relating to my accounts shall be settled by arbitration in accordance with the rules, then in effect, of the National Association of Securities Dealers, Inc. or the Board of Directors of the New York Stock Exchange, Inc., and/or the American Stock Exchange, Inc., as I may elect. If I do not make such election by registered mail addressed to you at your main office within 5 days after demand by you that I make such election, then you may make such election. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction thereof."

None of the claims asserted in this case by respondents arise under the federal securities laws.

[3] Jones specifically relied on the FAA and cases interpreting it in initially requesting the trial court to compel arbitration and stay respondents' claims on October 20, 1989. (See Appendix D, Memorandum in Support of Defendant's Motion to Compel Arbitration and to Stay Claims Asserted by Plaintiffs, at 3-6.)

court granted petitioner's motion and stayed the litigation of respondents' claims pending completion of arbitration (Apdx. A). The Court of Appeals, however, reversed that judgment (Apdx. B).

The heart of the Court of Appeals' decision was its determination that the FAA did not govern the arbitrability issue in this case. The court rejected petitioner's reliance on federal law and concluded that Missouri law controlled. That determination was based on a general choice-of-law clause in the Agreements providing that the "agreement and its enforcement shall be governed by the laws of the State of Missouri." 571 N.E.2d at 1332. The court interpreted *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), to hold that "state law [is] not pre-empted by the Federal Arbitration Act where the parties have agreed that their arbitration agreement will be governed by state law." 571 N.E.2d at 1332-33. The court said it would therefore "look to Missouri law in our construction of the contracts." *Id.* at 1333.

The court then held that the arbitration clauses in the Agreements violated Mo. Rev. Stat. § 435.460, which requires that contracts subject to Missouri's version of the Uniform Arbitration Act contain "a statement, in ten point capital letters, which read[s] substantially as follows: 'THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES.' " *Id.* at 1333. The Agreements had no such provision.

The court reached its conclusion despite its express acknowledgement that both the Missouri Supreme Court and the Eighth Circuit have held that the requirement of this notice provision is preempted by federal law land thus inapplicable to transactions involving interstate commerce. *Id.* (citing *Local 2, Int'l Brotherhood of Elec. Workers v. Anderson Underground Construction, Inc.*, 907 F.2d 74 (8th Cir. 1990); and *Bunge Corp.*

v. Perryville Feed & Produce, Inc., 685 S.W.2d 837 (Mo. banc 1985)).[4] The court distinguished those cases on the grounds that they did not involve a "choice-of-law clause, so their pre-emption analysis would not apply in this case." 571 N.E.2d at 1333.

The court noted that the appropriate remedy for a violation of the Missouri statute would be a remand to the trial court to determine whether the adverse parties had "actual notice" of the arbitration clauses (571 N.E.2d at 1333), but ruled that this step was unnecessary because, *under Missouri law*, the arbitration clauses would not be construed to encompass respondents' claims in any event.

Rejecting as merely "persuasive" the federal cases (*id.* at 1334 n.5) and relying on a case from Montana, the court held the arbitration provisions inapplicable to respondents' claims because they arose out of transactions consummated before the Agreements were executed. The court reasoned that "any ambiguity would be construed strictly against Jones as the drafter of the contract," and stated its opinion that "the Missouri courts would not apply the arbitration clauses retroactively." *Id.* at 1333-34. Consequently, the court reversed the trial court's order compelling arbitration and remanded the action for a trial on the merits. *Id.* at 1334.

Jones timely petitioned for transfer of the action to the Indiana Supreme Court, but on February 27, 1992, that court declined to accept transfer (Apdx. C).

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[4] Petitioner is headquartered in Missouri. Respondents are residents of Indiana, and the limited partnerships whose securities are the subject of this action are located in Denver, Colorado. Respondents have never disputed the fact that the transactions in question involved interstate commerce.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Indiana Court of Appeals' Holding That State Law Governs the Enforceability of the Arbitration Provision Violates the Supremacy Clause, Misinterprets this Court's Precedent, and Creates a Conflict Among the States and with Several Federal Circuits.

The Indiana court refused to enforce the arbitration agreement between the parties, holding that Missouri law, rather than federal law, governs the issue of arbitrability. It construed this Court's opinion in *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468 (1989), to mean:

> " . . . that state law was not pre-empted by the Federal Arbitration Act where the parties have agreed that their arbitration agreement will be governed by state law." 571 N.E.2d at 1332-33.

This interpretation reflects a total misunderstanding of the holding in *Volt* and doubtless will be cited for the global proposition that any contract containing a choice-of-state-law provision is not subject to the FAA. Neither *Volt* nor any other ruling from this Court supports such a principle.

Volt held only that parties can choose state rules to control the procedural aspects of an arbitration, but it reiterated the well-established precept that *enforceability* of an arbitration provision arising out of interstate commerce must be governed by the FAA. While permitting certain procedural matters to be controlled by state law, the Court in *Volt* emphasized that the substantive issue of enforceability is a matter of federal law. ". . . [T]he FAA therefore pre-empts application of state laws which render arbitration agreements unenforceable . . . . [T]he federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." 489 U.S. at 472, 476.

Volt did not, therefore, represent a departure from the line of cases holding that the FAA reflects a liberal federal policy favoring arbitration agreements to the exclusion of contrary state law. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983); *Southland Corporation v. Keating*, 465 U.S. 1 (1984); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). In *Perry v. Thomas*, 482 U.S. 483 (1987), the Court held preempted by the FAA a provision of California law permitting lawsuits for wages to be litigated "without regard to the existence of any private agreement to arbitrate." Citing and quoting *Moses H. Cone* and *Keating*, the Court summarized the applicable principles:

> "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act .... As we stated in *Keating*, 'in enacting section 2 of the federal Act, Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' [465 U.S.] at 10. 'Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements' .... 'We see nothing in the Act indicating that the broad principle of enforceability is subject to any additional limitations under state law.' " 482 U.S. at 489-90.

In the present case the Indiana court mistakenly construed *Volt* — which concerned the *way* arbitration was to be conducted — to mean that state law could determine *whether* arbitration would be conducted. It is beyond question that where, as here, interstate commerce is involved, the enforceability of an arbitration clause is a federal question, and nothing in *Volt* suggests otherwise.

The Indiana court attempted to justify its departure from established doctrine by pointing out that the contract at issue in this case contained a choice-of-law provision selecting Missouri law to govern the parties' rights. It read *Volt* as creating a large loophole in the preemption doctrine in any case involving any contract containing a choice-of-law provision. This reading was simply wrong. All federal circuits after *Volt*, when faced with a choice-of-state-law clause, have adhered to the rule that federal law displaces state law insofar as the determination of arbitrability is concerned. *See Todd Shipyards Corp. v. Cunard Line, Ltd.*, 943 F.2d 1056, 1062 (9th Cir. 1991); *Ackerberg v. Johnson*, 892 F.2d 1328, 1334 (8th Cir. 1989); *Raytheon Co. v. Automated Business Systems, Inc.*, 882 F.2d 6, 11 n.5 (1st Cir. 1989). The same result had been reached before *Volt* in *Commonwealth Edison Co. v. Gulf Oil Corp.*, 541 F.2d 1263 (7th Cir. 1976), and *Webb v. R. Rowland & Co.*, 800 F.2d 803 (8th Cir. 1986).[5]

The precise reach of *Volt* was perhaps best explained by the Eighth Circuit in *Ackerberg*, 892 F.2d at 1334, where the parties had agreed that Minnesota law would govern:

> "*Volt* thus holds that the parties to an arbitration agreement can agree that state *rules* concerning arbitration will govern their proceedings. It clearly does not hold that state law can determine whether any given claim is arbitrable under the Federal Arbitration Act. Whether a claim is arbitrable under federal law is not a procedural question, and *Volt* clearly relies on this distinction . . . ."

The lower court's misapplication of these precedents was egregious enough, but its opinion became truly inexplicable

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[5] State court decisions rejecting the Indiana rationale and applying federal law despite the parties' choice of state law include *Yates v. Doctor's Associates, Inc.*, 549 N.E.2d 1010 (Ill. App. 1990); *Pinkis v. Network Cinema Corp.*, 512 P.2d 751 (Wash. App. 1973); and *Mamlin v. Susan Thomas, Inc.*, 490 S.W.2d 634 (Tex. Civ. App. 1973).

when in purported to apply the Missouri law that the parties had supposedly chosen. It flatly disregarded a controlling decision of the Missouri Supreme Court and rulings by the Eighth Circuit both before and after *Volt* plainly holding that the notice provision of § 435.460 of the Missouri statues (which requires notice of arbitration to be set forth expressly in capital letters) does not apply to contracts involving interstate commerce. In *Bunge Corp. v. Perryville Feed & Produce, Inc.*, 685 S.W.2d 837 (Mo. banc 1985), the Missouri Supreme Court held that the notice requirement of § 435.460 was inconsistent with the FAA and could not be applied to an interstate transaction. The court said:

> "It is clear that § 435.460, if applied to this case, seeks to impose a requirement for contracts to arbitrate which is in addition to the requirements of the Federal Arbitration Act. All that is apparently required under that act is contractual language and format sufficient for an ordinarily written contract.... If the Missouri statute applies, then a commercial contract sufficient under federal law would be in violation.
>
> "There is a manifest violation of the supremacy clause if our statute is so applied." *Id.* at 839.

The Eighth Circuit, applying Missouri law, reached precisely the same result in *Webb*, 800 F.2d at 806-07, and *Local 2, IBEW v. Anderson Underground Construction, Inc.*, 907 F.2d 74, 76 (8th Cir. 1990).[6]

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[6] These decisions holding the Missouri notice provision to be preempted are consistent with cases from other circuits in which state statutes imposing special notice requirements on arbitration agreements have been held to be preempted. *See, e.g., Securities Industry Ass'n v. Connolly*, 883 F.2d 1114, 1117-20 (1st Cir. 1989), *cert. denied*, 495 U.S. 956 (1990); *David L. Threlkeld & Co. v. Metallgesellschaft Ltd.*, 923 F.2d 245, 249-50 (2d Cir.), *cert. dismissed*, 112 S. Ct. 17 (1991).

The court below once again attempted to explain its departure from *Bunge* and *Local 2* on the grounds that "[n]either of these cases involved a choice-of-law clause." 571 N.E.2d at 1333. This reasoning was defective because, as recognized by the federal circuits, the choice-of-law provision in the contract cannot override the supremacy of federal law.

The Indiana court's disregard of federal law was indefensible. The rationale of this decision and its misinterpretation of *Volt* threaten to clog court dockets with cases that the parties agreed to arbitrate. The ruling below stands squarely in the path of enforcement of the liberal federal policy favoring arbitration. This Court should therefore grant review to prevent further erosion of that policy.

II. The Indiana Court of Appeals' Holding That the Agreement To Arbitrate Did Not Encompass Preexisting Transactions Violated the Federal Policy That Such Agreements Should Be Interpreted in Favor of Arbitrability.

After holding that state, not federal law governed arbitrability, the Indiana court, purporting to apply Missouri law, relied solely on a case from the Montana Supreme Court to support its view that, even if the notice provisions of § 435.460 did not bar arbitration, this dispute was still not arbitrable. The court cited *Frates v. Edward D. Jones & Co.*, 760 P.2d 748 (Mont. 1988), for the proposition that ambiguities should be resolved against the drafter (petitioner) and held that the agreement to arbitrate could not be applied "retroactively." Once more, the court's analysis was seriously off target and out of line with the spirit and letter of the FAA and prevailing case law.

The arbitration provision at issue here stipulated that, except for claims arising under the federal securities laws, "... any other controversy arising out of or relating to my accounts shall be

settled by arbitration . . .[7] Properly analyzed, the question presented is not one of "retroactivity" in any sense. Since the arbitration provision refers to the resolution of a "controversy," there is no issue of retroactivity because all of the "controversies" arose after the agreement was signed. Rather, the issue posed is merely whether the parties agreed to arbitrate disputes that might arise in the future out of already-completed transactions. A plain reading of the simple language of the agreement compels an affirmative answer.

Not surprisingly, in cases governed by the FAA a number of courts have interpreted virtually identical arbitration language to encompass controversies arising out of transactions that occurred before the agreement to arbitrate was signed. *See, e.g., Belke v. Merrill Lynch, Pierce, Fenner & Smith,* 693 F.2d 1023, 1028 (11th Cir. 1982) ("any controversy between us arising out of your business"); *Rand Bond of North America, Inc. v. Saul Stone & Co.,* 726 F. Supp. 684, 687 (N.D. Ill. 1989) ("any controversy or claim arising out of or relating to your accounts"); *Gilmore v. Shearson/American Express, Inc.,* 668 F. Supp. 314, 320 (S.D.N.Y. 1987) ("any controversy arising out of or relating to the account of [plaintiff]"); *Clark v. Kidder, Peabody & Co.,* 636 F. Supp. 195, 197 (S.D.N.Y. 1986) ("all disputes arising out of or relating to accounts of or transactions with or for me or to this agreement or the breach thereof"). The Indiana ruling conflicts with all these holdings.

But even if, *arguendo,* the arbitration agreement is ambiguous concerning its applicability to controversies spawned by prior transactions, the proper approach under the FAA is to construe the clause liberally in favor of arbitration and not — as did the Indiana court — to construe it against the draftsman. "[D]ue regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself

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[7] None of the underlying claims arise under the federal securities laws.

resolved in favor of arbitration." *Volt,* 489 U.S. at 476. In *Mitsubishi,* 473 U.S. at 626, the Court said:

> "[A]s with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability."

In *Volt,* the Court, quoting *Moses H. Cone,* 460 U.S. at 424-25, emphasized that the FAA:

> " ' . . . create(s) a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act,' which requires that 'questions of arbitrability . . . be addressed with a healthy regard for the federal policy favoring arbitration,' and that 'any doubts concerning the scope of arbitrable issues . . . be resolved in favor of arbitration.' " 489 U.S. at 475.

Finally, in *AT&T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 650 (1986), the Court reinforced this rule of construction:

> "In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail."

The Indiana court's refusal to enforce the plain language calling for arbitration, coupled with its resort to state law to construe any supposed ambiguity against the draftsman, completely flouts federal policy and contravenes numerous decisions of this Court. The judicial antipathy toward arbitration evidenced by the lower court's opinion is a throwback to the antagonism rampant under the common law, which the FAA was specifically designed to overcome. *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 219-20 & n.4 (1985); *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 510-11 & n.4 (1974). The opinion below, and its underlying philosophy based upon a

distortion of *Volt*, will doubtless be cited by foot-dragging litigants to avoid arbitration agreements any time the contract contains a choice-of-law provision. Because of its manifestly flawed reasoning, its conflict with many other decisions and its propensity for subverting an important federal policy, the opinion below should be reviewed by this Court.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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May 1992

APPENDIX

APPENDIX A

IN THE FULTON CIRCUIT COURT
1990 TERM

CAUSE NO. 25C01-8908-CP-260

STATE OF INDIANA)
) SS:
COUNTY OF FULTON)

THURMAN D. ALBRIGHT, et al,
Plaintiffs

VS

EDWARD D. JONES & COMPANY
Defendant and Third-Party Plaintiff

VS

DAVID M. HOUSWORTH
Third-Party Defendant

ORDER UPON ARBITRATION ISSUES

This cause was heard in open court on the 27th day of December, 1989 at oral argument upon various pending motions. Upon the issue of defendant's Motion to Compel Arbitration and to Stay Claims Asserted by certain plaintiffs, the Court now rules as follows:

1. The defendant's Motion is GRANTED.

2. The Court now deems the claims of Steven W. & Linda K. Carter, Wilbur E. & Carol Frushour, Elizabeth R. Hillis, Larry E. & Norma B. Lewellen, Floyd C. & Norma J. Sickler, and Eugene W. & Donna L. Smith to be subject to arbitration. Accordingly, this cause is stayed pending completion of arbitration for each of these plaintiffs.

3. In so ruling, the Court deems that both the compensatory damage and punitive damage remedies that Indiana plaintiffs are entitled to pursue are available through the arbitration process.

SO ORDERED this 15 day of February, 1990.

/s/ Douglas B. Morton
Douglas B. Morton, Judge
Fulton Circuit Court

APPENDIX B

IN THE
COURT OF APPEALS OF INDIANA
THIRD DISTRICT

No. 25A03-9011-CV-496

THURMAN D. ALBRIGHT, et al.,
Appellant (Plaintiffs Below),

v.

EDWARD D. JONES & CO.,
Appellee (Defendant Below).

APPEAL FROM THE FULTON CIRCUIT COURT
The Honorable Douglas B. Morton, Judge
Cause No. 25C01-8908-CP-260

STATON, J.

Appellants bring this appeal from the entry of an order compelling arbitration, raising the issue of whether the arbitration clauses in agreements between appellants and appellee Edward D. Jones & Company (Jones) require arbitration of the controversy presently being litigated. As an additional issue, Jones challenges the appropriateness of the trial court's certification of the order compelling arbitration as a final appealable order pursuant to Indiana Rules of Procedure, Trial Rule 54(B).

We reverse.

A brief review of the facts of the underlying dispute serves to place this appeal in context. The appellants (hereinafter the "Account Agreement Plaintiffs") are ten of a number of plaintiffs who allegedly purchased interests in certain oil and gas limited partnerships in Petro-Lewis Corporation through Jones, who touted itself as a brokerage firm who catered to the small-town "conservative investor," specializing in "peace of mind

investments." After each investor took a substantial loss on his investment, this action was brought against Jones. The action was based on actual fraud, constructive fraud, violation of the Indiana Securities Act,[1] and violation of the Indiana RICO statute.[2] In support of the action, the Account Agreement Plaintiffs alleged that their losses were due to their reliance on various misrepresentation by Jones, including assertions that the Petro-Lewis investment was "conservative," "safe," and "decidedly low risk," when in fact the investments were risky and nearly impossible to liquidate.

Jones moved to compel arbitration of the claims and to stay the claims asserted by the Account Agreement Plaintiffs on the basis of arbitration clauses contained in "Full Service Account" agreements with Jones executed after the transactions which are the subject of this litigation. Jones asserted that the language in the arbitration agreements applied retroactively as well as prospectively to require that all disputes between the parties to the agreement were to be settled by arbitration. The accounts in question were all opened prior to the execution of the agreements upon which Jones relies. The trial court granted Jones's motion, entering an order compelling arbitration. The order was certified pursuant to Trial Rule 54(B) and this appeal ensued.[3]

We address first the procedural issue raised by Jones.

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[1] IND.CODE 23-2-1-1 *et seq.*

[2] IC 35-45-6-1 *et seq.*

[3] Although the order pertained to the claims of eleven of the plaintiffs in the action, only ten of the plaintiffs are parties to this appeal. The claims of Elizabeth R. Hillis have been voluntarily dismissed.

I.

Certification of Order

Jones argues that this appeal should be dismissed because the trial court erroneously certified the order compelling arbitration. It contends that the order compelling arbitration did not terminate all proceedings in the trial court, as it merely stayed the claims pending arbitration and did not resolve any issue raised in the complaint. Moreover, it notes that the order only required eleven of the numerous plaintiffs to submit to arbitration. Thus, it argues that certification was improper.

Jones's contention leads us to an examination of Trial Rule 54(B). Since Trial Rule 54(B) follows the federal rule, we have found it instructive to examine federal authorities on issues involving the rule where Indiana precedent is lacking. *Legg v. O'Connor* (1990), Ind.App., 557 N.E.2d 675. Federal Rule of Civil Procedure 54(b) permits the trial court to certify an order as appealable if it finds that is possesses the requisite degree of finality and disposes of at least a single substantive claims. *Id.* Generally, the standard for determining what constitutes finality under the federal rule is the same as that utilized in 28 U.S.C. § 1291. Wright, Miller & Kane, *Federal Practice & Procedure:* Civil 2d § 2656 at 51-52.

Prior to its legislative resolution in the federal system,[4] the issue of whether an order enforcing or refusing to enforce an arbitration agreement was appealable was aptly characterized as "baffling." *Id.*, § 3914 at 556. While it was settled that an order compelling arbitration or refusing to compel arbitration was

---

[4] In 1988, Congress amended the Federal Arbitration Act, adding a new appeals provision which establishes whether certain orders regarding arbitration may be appealed. Under the new section, orders compelling arbitration are not appealable. 9 U.S.C. § 15. This action is not governed by the Federal Act — see section II of this opinion, *infra*.

final if the sole object of the suit was to compel arbitration, the cases were split as to whether an order compelling arbitration was final when it arose out of a lawsuit where other relief was demanded as well. *Id.*, § 3914.34 at 413-414. At least one commentator expressed the opinion, however, that finality could be established through certification pursuant to F.R.C.P. 54(b) if the arbitration issue is "genuinely separate" from the other issues. *Id.*, §§ 3914 at 556, n. 54; 3914.34 at 414-415.

Our First District addressed the question of whether an order compelling arbitration is appealable in *Evansville-Vanderburgh Sch. Corp. v. Evansville Teachers Assoc.* (1986), Ind.App., 494 N.E.2d 321. The court stated the settled federal rule that an order compelling arbitration is an appealable final order in an action solely for that purpose. However, it cited a Federal case which held that an order which both compels arbitration and stays proceedings pending arbitration, although not technically final, fulfills the finality requirement for purposes of appeal. *Cincinnati Gas & Elec. Co. v. Benjamin F. Shaw Co.*. (6th Cir. 1983), 706 F.2d 155, 158. It also cited *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Griesenbeck* (1967), 21 N.Y.2d 688, 234 N.E.2d 456, which held that the mere fact that the motion to compel arbitration was made in the course of a pending action did not impair its finality. The complaint in *Evansville-Vanderburgh* also involved a second count seeking enforcement of the contract and damages. While the *Evansville-Vanderburgh* court found that the order compelling arbitration was appealable because jurisdiction of the interlocutory appeal had been accepted pursuant to Appellate Rule 4(B)(6), the court intimated that the order would have been appealable as a final order if the trial judge had certified it pursuant to Trial Rule 54(B). 494 N.E.2d at 324.

Our examination of the foregoing authorities leads us to hold that an order compelling arbitration, when properly certified by the trial court, is a final appealable order despite the existence of

other claims in the lawsuit if the arbitration order is severable from the rest of the claims in the lawsuit. In the present case, the trial court, citing *Evansville-Vanderburgh,* found:

> that this Court's Order Upon Arbitration Issues entered February 15, 1990, disposes of a distinct definite branch of this case, namely the request for an order compelling arbitration,leaving no further question to be determined as to that issue, that the effect of the Court's Order Upon Arbitration Issues entered February 15, 1990, is to compel certain Plaintiffs to arbitrate their claims precluding their right to participate in the trial against Defendant which is scheduled in March, 1991, that withholding the right to appeal and compelling the parties to go through useless arbitration is counter-productive, and that there is no just reason for the delay of an appeal of the Order Upon Arbitration Issues entered February 15, 1990.

Record, p. 302. The trial court did not err in certifying the order for appeal.

II.

Arbitration Agreements

A. Choice-of-Law

Initially, there is some disagreement as to what law applies in the construction of the arbitration agreements in question. Jones argues that federal law applies, and cites considerable federal precedent favoring its contention that arbitration is required. The Account Agreement Plaintiffs, on the other hand, argue that the choice-of-law clause in the account agreements should control. The agreements executed by the Account Agreement Plaintiffs, clearly drafted by Jones, are not all identical — there are three different variations. However, each contained the following clause:

> This agreement and its enforcement shall be governed by the laws of the State of Missouri and its provisions shall be continuous; shall cover individually and collectively all accounts which the undersigned may open or reopen with you, and shall insure [sic] to the benefit of your present organization, and any successor organization, irrespective of any change or changes at any time in the personnel thereof, for any cause whatsoever, and of the assigns of your present organization, or any successor organization, and shall be binding upon the undersigned, and/or estate, executors, administrators and assigns of the undersigned.

Jones argues that the Account Agreement Plaintiffs waived any argument as to the applicability of Missouri law by failing to raise the argument at the trial court level. Although the Account Agreement Plaintiffs did not cite the specific principles of Missouri law upon which they rely on appeal, they did note the choice-of-law provision in a memorandum of law to the trial court and argued that choice-of-law problems were inappropriate for settlement in arbitration. Moreover, the Account Agreement Plaintiffs are not raising a new issue on appeal. They merely are advancing a new legal argument in support of the original issue raised at the trial court level — the propriety of compelling arbitration under the contract. Thus we will address their contentions with respect to Missouri law.

In support of their argument that the choice-of-law clause in the agreements controls, the Account Agreement Plaintiffs cite *Volt Information Sciences Inc. v. Board of Trustees* (1989), 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 480. In *Volt*, the Supreme Court held that state law was not pre-empted by the Federal Arbitration Act where the parties have agreed that their arbitration agreement will be governed by state law. Jones cites numerous lower court cases which either support this proposition or were decided before *Volt*. As we find *Volt* controlling, we will look to Missouri law in our construction of the contracts.

B. The Missouri Notice Statute

The Account Agreement Plaintiffs contend that the arbitration agreements failed to comply with Missouri Revised Statutes § 435.460, enacted in 1980. That statute provides:

> Each contract subject to the provisions of [the Missouri Uniform Arbitration Act] shall include adjacent to, or above, the space provided for signatures a statement, in ten point capital letters, which read [sic] substantially as follows: "THIS CONTRACT CONTAINS A BINDING ARBITRATION PROVISION WHICH MAY BE ENFORCED BY THE PARTIES."

The logical purpose of this section is to notify parties that their contract includes a provision for arbitration. *State ex rel. Tri-City Const. Co. v. Marsh* (1984), Mo.App., 668 S.W.2d 148, 153. It evinces a legislative concern that the voluntary nature of arbitration agreements be assured. *Hefele v. Catanzaro* (1987), Mo.App., 727 S.W.2d 475, 476. The statute applies only to agreements made subsequent to August 13, 1980, the effective date of the Act. *Id.*; Mo.Rev.Stat. § 435.445. This provision has been applied by the Missouri courts to render an arbitration clause unenforceable where the contract did not contain the requisite statement. *Hefele, supra.*

An examination of the agreements in question reveals an absence of the requisite language, despite the fact that each was executed after 1990. In addition, the arbitration clauses are in normal type, and are not set off in any way in the contracts to call attention to them. Thus, the arbitration clauses would not be enforceable under Missouri law.

Jones cites *Bunge Corp. v. Perryville Feed and Produce, Inc.* (1985), Mo., 685 S.W.2d 837 and *Local 2, Int'l Brotherhood of Elec. Workers v. Anderson Underground Const. Inc.* (8th Cir. 1990), 907 F.2d 74 in support of its contention that the statute

does not extend to arbitration agreements which are within interstate commerce. Neither of these cases involved a choice-of-law clause, so their pre-emption analysis would not apply in this case. *Volt, supra.*

Having concluded that the agreement is not in compliance with the Missouri statute, the proper remedy under Missouri law appears to be to remand for a hearing to determine whether the Account Agreement Plaintiffs had actual notice of the arbitration clauses. *Forest Hills Country Club v. Weber* (1985), Mo.App., 691 S.W.2d 361, *transfer denied. But see Hefele, supra* (reversed order compelling arbitration without remand for hearing to determine actual notice). However, we find a hearing unnecessary in this case, since we agree with the Account Agreement Plaintiff's contention that the terms of the agreements do not include the transactions which are the subject of this lawsuit.

C. Terms of the Agreement

Jones argues that the terms of the agreement indicate that the arbitration clause is to be applied retroactively. This precise issue was resolved against Jones in *Frates v. Edward D. Jones & Co* (1988), Mont., 760 P.2d 748. In *Frates*, the plaintiff filed a complaint against Jones containing nearly identical allegations as the instant case regarding the sale of Petro-Lewis and NRM securities. The trial court denied Jones' motion to stay litigation and to compel arbitration and Jones appealed. The Supreme Court of Montana affirmed, holding that the trial court properly found that the language in the agreement was prospective only, and did not apply to the transactions in question, which were entered before the execution of the agreement. As in this case, the contract states, "[t]his agreement . . shall cover . . . all accounts which the undersigned may open or reopen with you . . . ." *Id.* at 751. The court also noted that any ambiguity would be construed strictly against Jones as the drafter of the contract. *Id.* at 752. The court distinguished federal authority permitting the retroactive application of an arbitration agreement.

We agree with the Supreme Court of Montana's conclusion in *Frates* that the clear language of the agreement requires prospective application of the arbitration clauses. Jones contends that *Frates* is an anomaly, and cites numerous federal cases, each of which involved language which evinced an intent that the agreement was to be applied retroactively.[5] Such is not the case here. We are of the opinion that the Missouri courts would not apply the arbitration clause retroactively.

Accordingly, we reverse the decision of the trial court compelling arbitration and staying the pending litigation and remand for a trial on the merits.

HOFFMAN, P. J., and MILLER, J., CONCUR.

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[5] Missouri law, not federal law, is governing here. *See* section II(A) of this opinion, *supra*. Thus federal cases construing the Federal Arbitration Act are persuasive, not binding authority.

APPENDIX C

STATE OF INDIANA
CLERK OF THE SUPREME COURT
COURT OF APPEALS AND TAX COURT

INDIANAPOLIS, 46204
TELEPHONE 317-232-1930

DWAYNE M. BROWN, CLERK
217 STATE HOUSE

[SEAL]

Cause Number
25A03-9011-CV-00496

LOWER CAUSE
25C018908CP260

JOHN MICHAEL CLEAR
BRUCE C. OETTER, L. ASARO
500 N. BROADWAY
ST. LOUIS, MO 63102-0000

ALBRIGHT, THURMAN -V- COMPANY, EDWARD D. JONES &

You are hereby notified that the Supreme Court has on this day 2/27/92

APPELLEE'S PETITION FOR ORAL ARGUMENT IS HEREBY DENIED.
RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR.

APPELLEE'S PETITION TO TRANSFER IS HEREBY DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR.

WITNESS my name and the seal of said Court,
this 27th day of FEBRUARY, 1992

/s/ Dwayne Brown
Clerk Supreme Court,
Court of Appeals and Tax Court

APPENDIX D

IN THE FULTON CIRCUIT COURT
1989 TERM

CAUSE NO. 25C01-8908-CP-00260
[Filed October 20, 1989]

STATE OF INDIANA)
) SS:
COUNTY OF FULTON)

THURMAN D. ALBRIGHT, et al.,
Plaintiffs,

v.

EDWARD D. JONES & CO., et al.,
Defendants.

Memorandum In Support Of Defendant's Motion To Compel Arbitration And To Stay Claims Asserted By Plaintiffs

* * * *

ARGUMENT

The transactions between the Arbitration plaintiffs and EDJ were in interstate commerce and therefore their arbitration agreements are governed by the Federal Arbitration Act, 9 U.S.C. §§ 1-14 (1982).[2] The Act and its underlying policy and directive have been described by the Supreme Court as follows:

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[2] Indiana courts construing the Indiana Uniform Arbitration Act have held that where the federal Arbitration Act is applicable, as here, the Indiana Act is inapplicable. *University Caseworks v. Bahre* (1977), 172 Ind. App. 624, 362 N.E.2d 155, and *Pathman Construction Co. v. Knox County Hospital Assoc.* (1975), 164 Ind. App. 121, 326 N.E.2d 844. In *Southland Corp. v.*

(Footnote 2 continued on next page)

> Federal law in terms of the Arbitration Act governs [arbitrability of a dispute] in either state or federal court. Section 2 is the primary substantive provision of the Act, declaring that a written agreement to arbitrate "in any maritime transaction or a contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 USC § 2. Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary. The effect of the section is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act. . . . The Arbitration Act establishes that, as a matter of federal law, *any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration,* whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.

Moses H. Cone Hospital v. Mercury Const. Corp. (1983), 460 U.S. 1, 24-25 (emphasis added). In recent decisions the Supreme Court has applied the Arbitration Act and these principles to agreements between securities brokers and customers, enforcing arbitration agreements even as to claims under the federal securities laws. *Rodiquez de Quijas v. Shearson/American Express Inc.* (1989), U.S., 57 U.S.L.W. 4539; *Shearson/American Express Inc. v. McMahon* (1987), 483 U.S. 1056; *Dean Witter Reynolds Inc. v. Byrd* (1985), 470 U.S. 213, 221: "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and

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(Footnote 2 continued)

Keating (1994), 465 U.S. 1, the Supreme Court held that under the Supremacy Clause, the federal Arbitration Act applied in state courts and applied to state statutory liabilities in preemption of any contrary state law.

that concern requires that we vigorously enforce agreements to arbitrate. . . ."

The effect of the arbitration agreement signed by the Arbitration Plaintiffs with EDJ is the same regardless of whether the agreement was signed before, after, or at the time of the particular transaction giving rise to the dispute.[3] Agreements similar in text to the EDJ Agreement have been held to apply to transactions which occurred before the execution of the agreement. For example, in *Gilmore v. Shearson/American Express* (1987), S.D.N.Y., 668 F. Supp. 314, the broker-customer contract provided that "[a]ny controversy arising out of or relating to the account of the undersigned . . . shall be arbitrated." The court rejected a contention that the contract did not apply to previous transactions:

> That some of the transactions may have preceded the date of the agreement is not relevant. The arbitration clause, by its terms, applied to any controversy relating to plaintiff's account.

668 F. Supp. at 320 n.10. Another decision found that the use of the term "accounts," as in the EDJ Agreement, further indicated the intended coverage of pre-contract matters:

> The plural references emphasized are broad enough on their face to cover disputes regarding transactions in previously established accounts between the same parties.

Bernstein v. Shearson/American Express Inc. (1987), S.D.N.Y., [1987 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 93,392 at 97,051 (copy attached).

---

[3] The EDJ Agreements executed by the Arbitration Plaintiffs appear to have been signed after the alleged dates of their Petro-Lewis purchases. The EDJ Agreement signed by plaintiffs Eugene W. and Donna L. Smith, *see* fn.1 *supra*, states expressly that it applies to previous, concurrent, and subsequent transactions, the intent implicit in the previous form of Agreement.

Numerous other decisions have reached the same conclusion. *E.g., Belke v. Merrill Lunch,* [sic] *Pierce, Fenner & Smith* (1982), 11th Cir., 693 F.2d 1023; *Futransky v. Shearson Lehman Hutton Inc.* (1988), N.D. Ill., [1988-1989 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 94,148 (copy attached); *Western Hospitals Credit Union v. E. F. Hutton & Co.* (1988), N.D. Cal., 700 F. Supp. 1039; *Clark v. Kidder, Peabody & Co.* (1986), S.D.N.Y., 636 F. Supp. 195; *Shotto v. Laub* (1986), D. Md., 632 F. Supp. 516.

The investments of the Arbitration Plaintiffs at issue here fall squarely within the plain language of the arbitration clause, which applies to "any controversy." If the clause were intended to apply only to future investments or controversies, it would have contained a provision limiting it to "any future controversy or purchase." *See Coenen v. R.W. Pressprich & Co.* (1972), 2d Cir., 453 F.2d 1209, 1212, *cert. denied,* (1972) 406 U.S. 949.

In addition to mandating arbitration, the Federal Arbitration Act and the policies behind it plainly require a stay of the claims asserted by the Arbitration Plaintiffs pending the outcome of arbitration. *See* 9 U.S.C. § 3 (1982). This is in accord with Indiana practice, IND. CODE § 34-4-2-3(d) (1988). Thus, since the Arbitration Plaintiffs must arbitrate, they must be precluded from participating in this action by means of a stay, to avoid duplicative proceedings.

CONCLUSION

For the reasons stated above, Arbitration Plaintiffs should be compelled to arbitrate all of their claims. The Court also should stay the litigation of all claims asserted by the Arbitration Plaintiffs herein pending the completion of the arbitration.

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Supreme Court, U.S.
FILED
JUN 12 1992
OFFICE OF THE CLERK

(2)

No. 91-1829

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWARD D. JONES & CO., L.P.,

Petitioner,

v.

STEVEN W. and LINDA K. CARTER,
WILBUR E. and CAROL FRUSHOUR,
LARRY E. and NORMA B. LEWELLEN,
FLOYD C. and NORMA J. SICKLER,
and EUGENE W. and DONNA L. SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

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(8)

Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF THE CASE 1

ARGUMENT:

I. Jones Fails to Present Any Question Warranting this Court's Exercise of Judicial Discretion Pursuant to Supreme Court Rule 10.1 3

A. The Indiana Court of Appeals' Discussion of Mo.Rev.Stat. § 435.460 is Merely *Obiter Dictum* Without Precedential Value 4

B. The Indiana Court Did Not Hold that Ambiguous Arbitration Clauses Should be Construed Against the Drafter 6

II. Jones Misses the Point of the Indiana Court's Holding 7

III. The Indiana Court was Justified in Finding that the Subject Agreements Were not Reasonably Susceptible of an Interpretation Compelling Arbitration. 9

CONCLUSION 14

TABLE OF AUTHORITIES

Page

Cases:

Belke v. Merrill Lynch, Pierce, Fenner & Smith, 693 F.2d 1023 (11th Cir. 1982) 12

Cincinnati Insurance Co. v. Mallon, 409 N.E.2d 1100 (Ind.App. 1980) 7

Clark v. Kidder, Peabody & Co., 636 F.Supp. 195, (S.D.N.Y. 1986) 13

Frates v. Edward D. Jones & Co., 760 P.2d 748 (Mont. 1988) 6, 14

Gilmore v. Shearson/American Express, Inc., 668 F.Supp. 314, (S.D.N.Y. 1987). 13

Koske v. Townsend Engineering Co., 551 N.E.2d 437 (Ind. 1990) 5

Rand Bond of North America, Inc. v. Saul Stone & Co., 726 F.Supp. 684 (N.D. Ill. 1989) 12

Volt Information Sciences, Inc. v. Board of Trustees, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1980) . . 5, 6, 8, 9

Statutes and Other Authorities:

Mo.Rev.Stat. §435.460 4

9 U.S.C. §2 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

EDWARD D. JONES & CO., L.P.,

Petitioner,

v.

STEVEN W. and LINDA K. CARTER,
WILBUR E. and CAROL FRUSHOUR,
LARRY E. and NORMA B. LEWELLEN,
FLOYD C. and NORMA J. SICKLER,
and EUGENE W. and DONNA L. SMITH,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF INDIANA, THIRD DISTRICT

STATEMENT OF THE CASE

Respondent's counsel received Petition for Writ of Certiorari to the Court of Appeals of Indiana, Third District, on May 13, 1992. Accordingly, this brief is due by June 12, 1992.

Petitioner Edward D. Jones & Co.'s (hereafter "Jones") Statement of the Case is argumentative. Apart from that,

it omits several matters pertinent to consideration of its petition for writ of certiorari.

The instant action arose out of allegations that Jones sold Petro-Lewis oil and gas limited partnerships in violation of the Indiana Securities Act and the Indiana Racketeer Influenced and Corrupt Organization Act. The complaint also asserted that Jones committed fraud and constructive fraud in the sale of those securities.

The action was commenced by 68 individual plaintiffs. However, with regard to 11 of those plaintiffs, Jones filed a motion to compel arbitration. That motion was based on Full Service Account Agreements signed by those 11 plaintiffs substantially after their Petro-Lewis investments. The trial court entered its order compelling arbitration, which was followed by an appeal by the 11 affected plaintiffs, heretofore and hereafter referred to as the "Account Agreement Plaintiffs." [1]

The arbitration clause in question consisted of a few lines in the middle of a two page, small-print Account Agreement. (R. 38-49) Although Jones quotes a typical arbitration clause in footnote 2 of its petition, it conveniently fails to note that portion of the Account Agreements which governed the matters to which the entire agreement applied. Specifically, the Account Agreements stated that:

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[1] Footnote 1 on page 2 of Jones' Petition for Writ of Certiorari to the Court of Appeals of Indiana, Third District, refers to the fact that a number of the original plaintiffs were not parties on appeal and leaves the impression that the non-appealing plaintiffs accepted the court's arbitration order. In fact, the non-appealing plaintiffs were unaffected by the arbitration order inasmuch as they did not sign Account Agreements. Their actions continued, and on July 16, 1991, a judgment was entered in their favor and against Jones for approximately $2.8 million which included $1.75 million in punitive damages.

"This agreement . . . shall cover . . . all accounts which the undersigned may open or reopen with you . . ."

(R. 39, 41, 43, 45, 47, 49)

As already mentioned, Jones committed the acts complained of in the complaint, resulting in the Account Agreement Plaintiffs' purchases of Petro-Lewis, substantially before the signing of the Account Agreements containing the arbitration clause. Specifically, four of the Account Agreement Plaintiffs had purchased the security approximately 6 years or more before they signed the Account Agreement; two purchased the security about 4½ years before signing the agreement; two signed the agreement roughly 3½ years after their purchases; and the remaining two signed more than 1½ years after they had completed their purchases. (R. 3-15, 38-49) Jones made no attempt to show that the accounts through which the Petro-Lewis securities were purchased were opened or reopened after the execution of the Account Agreements.

ARGUMENT

I.

JONES FAILS TO PRESENT ANY QUESTION WARRANTING THIS COURT'S EXERCISE OF JUDICIAL DISCRETION PURSUANT TO SUPREME COURT RULE 10.1

Rule 14.1(a) of the Rules of the Supreme Court require a petition for writ of certiorari to state the questions presented for review. That rule also limits the Court's exercise of its discretionary review to the precise questions stated in the petition for writ of certiorari by providing that "[o]nly the questions set forth in the petition, or fairly included therein, will be considered by the Court."

Jones' Petition for Writ of Certiorari to the Court of Appeals of Indiana, Third District lists three questions presented to this Court. The first two questions as stated by Jones relate to the discussion by the Court of Appeals of Indiana of Mo.Rev.Stat. §435.460 and its effect on the arbitration clause as contained in the various Account Agreements. The third question as stated by Jones relates to what Jones claims was the Indiana court's adoption of a rule that ambiguities in an arbitration clause should be construed against the draftsman.

As discussed below, none of the questions presented by Jones creates a special and important reason for granting a writ of certiorari.

A. The Indiana Court of Appeals' Discussion of Mo.Rev.Stat. §435.460 is Merely *Obiter Dictum* Without Precedential Value.

Jones' petition devotes significant attention to the discussion by the Court of Appeals of Indiana regarding Mo.Rev.Stat. §435.460. Jones posits that the Indiana court violated the supremacy clause by applying a state statute precluding arbitration in violation of the federal policy favoring arbitration.

In reality, the Indiana court's discussion of Mo.Rev.Stat. §435.460 had virtually no impact on that court's holding. Although that court concluded that the arbitration provision in question violated Mo.Rev.Stat. §435.460, the court's holding is not based on that violation. Rather, the Indiana court based its decision on the well-recognized principle that arbitration should not be required where no agreement to arbitrate exists; here the Account Agreements did not cover the transactions at issue. In short, the court's discussion of the Missouri

statute was wholly unnecessary to its ultimate decision. Accordingly, the court's discussion of the Missouri statute is merely *obiter dictum.*

It is well settled in Indiana that *obiter dictum* has no value as precedent. In *Koske v. Townsend Engineering Co.*, 551 N.E.2d 437 (Ind. 1990), the Supreme Court of Indiana recently noted that:

> "In appellate opinions, statements not necessary in the determination of the issues presented are *obiter dictum.* They are not binding and do not become the law."

Id. at 443.

Thus, Jones seeks a writ of certiorari based, in large part, on a discussion which had no binding impact anywhere – not even in the State of Indiana. Regardless of how the Supreme Court might answer Questions 1 and 2 presented by Jones' petition, those answers can hardly be construed as raising special and important reasons for the writ sought inasmuch as the lower court's holding was not as Jones presupposes in the first two Questions Presented.

In view of the many cases which have discussed *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989), and its effect on state statutes relating to arbitration of disputes, it may be necessary for this Court some day to discuss the scope of *Volt.* However, a case which was not decided on the basis of the state statute under attack hardly presents the opportune occasion for such analysis.[2]

---

[2]The Account Agreement Plaintiffs disagree with Jones' interpretation of *Volt* and its progeny. Jones' argument fails to consider the result in *Volt,* which is inextricably pertinent to its

[footnote continued]

B. The Indiana Court Did Not Hold that Ambiguous Arbitration Clauses Should be Construed Against the Drafter.

Paragraph 3 of the Questions Presented and the related argument of Jones presumes that the Court of Appeals of Indiana held that an ambiguous arbitration clause should be construed against the draftsman. Jones then concludes that the Indiana court's opinion in that regard contravenes ruling precedents of this Court.

The main problem with Jones' argument in this regard is that Jones attributes to the Indiana court a holding not made by that court. In reality, the language regarding ambiguities, which Jones attempts to attribute to the Indiana court, is instead included within that court's discussion of *Frates v. Edward D. Jones & Co.*, 760 P.2d 748 (Mont. 1988). In discussing *Frates*, the Indiana court noted that, among other things, the *Frates* court stated that ambiguities should be construed against the drafter. However, the Indiana court clearly did not adopt or even approve of that particular language in *Frates*. Instead that court held that:

> "We agree with the Supreme Court of Montana's conclusion in *Frates* that the *clear language of the agreement requires prospective application of the arbitration clauses.*"

571 N.E.2d at 1334 (Emphasis supplied).

In interpreting contract provisions, the courts consider the rule regarding construction of documents against the drafter only where the contract is ambiguous; where the

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holding. However, further analysis of *Volt's* impact on the application of state statutory provisions in an arbitration setting is inappropriate here since the holding of the Indiana court was not based on the application of the Missouri statute.

clear language of the agreement shows the intent of the parties, there is no reason to resort to the rule regarding construction of ambiguous documents against the drafter. *See, e.g., Cincinnati Insurance Co. v. Mallon,* 409 N.E.2d 1100 (Ind.App. 1980). Thus, by holding that the "clear language" of the agreements refuted Jones' claim for arbitration, the Indiana court had no occasion to decide what happens in the event of an ambiguity in an arbitration agreement. Jones' mischaracterization of the opinion of the Court of Appeals in this regard is an obvious attempt to question the court's opinion based on federal cases which, in reality, are inapplicable. Even the federal cases cited by Jones do not require arbitration where "the clear language of the agreement" shows that the parties did not agree to arbitrate the dispute at hand.

Jones' argument in this regard is accordingly based on a false premise, *i.e.* that the Indiana court declared a rule of law which it did not in fact so declare. Inasmuch as the third question presented by Jones can warrant the granting of the writ sought only by ignoring the actual holding of the lower court, that question cannot form the basis for a finding of a special and important reason for the granting of the writ.

II.

JONES MISSES THE POINT OF THE INDIANA COURT'S HOLDING.

In its zeal to obtain a writ of certiorari, Jones either intentionally or unwittingly misses the rationale behind the holding of the Indiana court. Throughout its petition, Jones contends that the Court of Appeals of Indiana "rejected" federal authorities by refusing to order arbitration. Jones' argument results from a disregard of, or confusion over, the federal scheme creating a dichotomy

between the standards applicable to construction of arbitration clauses generally and the construction of specific contract language pursuant to those federal standards. Contrary to Jones' argument, the Indiana court did not "reject" any federal authority.

While the federal authorities are uniform in announcing a healthy regard for arbitration, no case requires arbitration in every situation. The Federal Arbitration Act declares, and the federal authorities are consistent in holding, that arbitration will only be ordered when an agreement to arbitrate the particular dispute at hand exists. 9 U.S.C. §2; *Volt, supra.* While federal authorities direct that contracts be interpreted with a preference for arbitration, the very basic fact remains that someone must apply some rules of contract construction in order to make the threshold determination of whether or not the agreement at hand meets the federal standard, *i.e.* whether it is reasonably susceptible of an interpretation favoring arbitration.

A fundamental question is, "What rules of contract construction should be applied in making the threshold determination?" *Volt, supra,* clearly answers this question by declaring that state law rules regarding contract construction should be applied. *Id.* at 474, 109 S.Ct. at 1253. Even the dissent in *Volt* agreed that "the interpretation of contracts is a matter of state law." *Id.* at 482, 109 S.Ct. at 1257. Thus, the threshold determination of whether or not the agreement is reasonably susceptible of an interpretation favoring arbitration is made in accordance with state rules of contract construction. Accordingly, the Indiana court was warranted in looking "to Missouri law in our *construction of the contracts.*" 571 N.E.2d at 1333 (Emphasis supplied).

In the instant case, there is absolutely nothing to indicate that, in the application of state rules of contract construction, the lower court failed to apply the federal standard by giving a healthy preference to arbitration. In effect, the Indiana court applied state rules of contract construction and concluded that the language of the subject contract was not reasonably susceptible of an interpretation calling for arbitration of the subject dispute. As stated in *Volt*, "this Court does not sit to review" such state court conclusions. *Id.* at 474, 109 S.Ct. at 1253.

Despite Jones' protestations to the contrary, the Indiana opinion does not contravene any ruling of this Court or conflict with any other federal authority but is instead consistent therewith.

III.

THE INDIANA COURT WAS JUSTIFIED IN FINDING THAT THE SUBJECT AGREEMENTS WERE NOT REASONABLY SUSCEPTIBLE OF AN INTERPRETATION COMPELLING ARBITRATION.[3]

Although it is questionable whether this Court should ever become involved in an individual case of arbitration contract construction where there is no indication that the lower court violated principles favoring arbitration (*Volt, supra* at 474, 109 S.Ct. at 1253.), a review of the contract language involved in this case shows that the

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[3]The interpretation of the specific language at issue in this case is not fairly included in Jones' questions presented for review. However, Jones argues in its brief that the specific language of the Account Agreement should be construed to apply retroactively. While this Court can disregard an issue mentioned only in the argument, the Account Agreement Plaintiffs nonetheless respond to Jones' argument regarding the specific language involved in the event the court considers that language.

Indiana court was warranted in construing that language and concluding that "the clear language of the agreement requires prospective application of the arbitration clauses." 571 N.E.2d at 1334.

A complete reading of the Account Agreements illustrates that the parties did not intend the agreements, including the arbitration clause, to apply to the previous purchases of the Petro-Lewis securities. The Account Agreements stated that the arbitration clause applied to controversies arising out of or relating to accounts. The agreement then effectively defines "accounts" as used throughout the agreement, including the arbitration clause, by stating that the coverage of the agreement extends to all accounts which the customer "may open or reopen;" the definition of "accounts" makes no mention of accounts that are already opened (except to the extent those accounts may in the future be reopened) or of previously opened accounts which may have been closed at the time of the execution of the Account Agreements.

Giving the words of the Account Agreements their usual and common meaning, the only reasonable explanation of that language is that the Account Agreements were executed to cover, prospectively, accounts opened or reopened in the future. Therefore, the Indiana court correctly reasoned that compelling arbitration of the Petro-Lewis purchases completed several years before execution of the Account Agreements resulted in the Account Agreement Plaintiffs being required to arbitrate claims which they had not agreed to arbitrate.

In an effort to avoid the language specifying prospective application of the Account Agreements (*i.e.* to accounts opened or reopened after the execution of the agreements), Jones ignores that language and instead

argues that the "controversy" arose after the signing of the Account Agreements. In essence, Jones seeks to rewrite the agreements so as to require arbitration of "disputes" arising after the execution of the Account Agreements despite the fact that the Account Agreements expressly limit their application to accounts opened or reopened after their execution; the applicability of the Account Agreements is not in any way governed by the date a dispute arises.

Further, this entire argument by Jones ignores the procedural background of this case, further illustrating the flaws in Jones' argument. Procedurally, the instant action was not the first filed against Jones as a result of its conduct in the sale of Petro-Lewis securities. On March 8, 1985, an initial action was filed on the same matter, and that action sought class action certification to include all Petro-Lewis purchasers including the Account Agreement Plaintiffs. (R. 10) It was only after class action certification was denied on May 5, 1988, that the Account Agreement Plaintiffs ceased to be part of the putative class, and this action followed. (R. 10) Eight of the Account Agreement Plaintiffs signed their agreements after the filing of the first lawsuit on March 8, 1985, while they were still members of the putative class. (R. 38-49) Therefore, by Jones' own definition the "controversy" or "dispute" in the instant matter arose before the execution of the Account Agreements, and the arbitration clause was inapplicable thereto.

Finally, in an effort to avoid the clear impact of the language used in the agreement as drafted, Jones cites several federal court cases where the particular contract language called for arbitration of past transactions. Jones calls the contract language in those cases virtually identical to the contract language in the instant case. However,

an analysis of those authorities shows that they are distinguishable and that the reason arbitration may have been proper there but not here is due to very significant differences in the particular contract language at issue.

In *Belke v. Merrill Lynch, Pierce, Fenner & Smith,* 693 F.2d 1023 (11th Cir. 1982), the court was faced with an arbitration clause which required arbitration of "any controversy between us arising out of *your business or this agreement*" [*Id.* at 1025, footnote 4 (Emphasis supplied)], without any language of prospective application as was involved in the instant case. Arbitration language applying to "your business or this agreement," without language of prospective application, is clearly susceptible of an interpretation that it applies to past transactions. However, the clear distinction between the broad language in *Belke* and the considerably narrower language involved here is further indication of why arbitration should not have been required in the instant case.

In *Rand Bond of North America, Inc. v. Saul Stone & Co.*, 726 F.Supp. 684 (N.D. Ill. 1989), the court was not dealing with the retroactive application of an arbitration agreement – at least not in the same sense as in the instant case. In *Rand Bond* the parties entered into a commodities trading arrangement. Although the first order was placed on April 27, 1987, the documentation establishing the arrangement was not signed until May 4, 1987. However, it was apparent that the documents of agreement signed May 4 governed the entire relationship of the parties commencing April 27. Further, the Arbitration Agreement, which was one of the documents signed May 4, expressly applied to "[a]ny controversy or claim arising out of or relating to your accounts" (*Id.* at 689) without any limitation whatsoever as to the accounts or transactions governed by the agreement. The instant

Account Agreements contained such a time limitation inasmuch as they expressly applied only to accounts thereafter opened or reopened.

The remaining cases relied upon by Jones contain arbitration clauses which are significantly broader than in the instant cases. Those clauses contain no limitation on the accounts to which they apply, support retrospective application, and are otherwise qualitatively distinguishable from the language in the instant case. *Gilmore v. Shearson/American Express, Inc.*, 668 F.Supp. 314, (S.D.N.Y. 1987) [arbitration applying to "[a]ny controversy *arising out of or relating to the account* of the undersigned, *to transactions with you* for the undersigned *or to this agreement*" (Emphasis supplied)]; *Clark v. Kidder, Peabody & Co.*, 636 F.Supp. 195 (S.D.N.Y. 1986) [arbitration prescribed for disputes "arising out of or relating to *accounts* of *or transactions* with or for me or to this agreement" (Emphasis supplied) without language of prospective application].[4]

Here, there was a significant break between the completion of the purchases out of which this action arose and the date of execution of the Account Agreements containing the arbitration clause. The least amount of time which elapsed between those dates was one and a half years with the greatest time elapsed being nearly seven years. The average elapsed time between completion of the fraudulent sale of the Petro-Lewis security

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[4]In fact, in *Clark v. Kidder, Peabody*, the court's opinion implies that arbitration for past transactions would not have been ordered had the agreement containing the arbitration clause resulted in the opening of a new account, such as was apparently the situation in the instant case, rather than the restructuring of an existing account. 636 F.Supp. at 197.

and the execution of the Account Agreements was in excess of four years.

Jones has not cited, and is clearly unable to cite, any authority where a contract or arbitration provision was held retroactively applicable to a transaction completed more than four years (much less to transactions completed nearly seven years) before the agreement was signed, especially where the pertinent language is prospective, rather than retroactive, in nature. In fact, the only two appellate tribunals to consider the precise language in the instant Account Agreements, namely the Montana Supreme Court in *Frates, supra,* and the Court of Appeals of Indiana in the instant case, have construed the language contrary to Jones' position.

CONCLUSION

Jones has failed to present any question warranting the grant of the writ sought. Also, Jones has failed to show any precedent established by the Court of Appeals of Indiana which contravenes any holding of this Court. Further, Jones has not established that the Indiana court did anything other than construe the agreements at issue under the standard of a healthy preference for arbitration. Instead, Jones seeks to involve this Court in virtually every case of interpretation of specific contract language and would have this Court hold that arbitration is required virtually anytime the word "arbitration" is used even though the clear intent of the parties, as expressed in their agreement, shows that arbitration was not intended for the dispute at hand.

In view of the foregoing, the Account Agreement Plaintiffs respectfully request that Jones' petition for writ of certiorari be denied.

Respectfully submitted,

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